Supreme Court, U.S.
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No.

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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LYNDON B. FREDERICK,
*Petitioner,*

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the "inevitable discovery" rule has ended the Fourth Amendment requirement that law enforcement officers procure a warrant before conducting a search of a private home.

II. Whether the trial court erred by allowing the prosecution to use evidence, which had been illegally seized and suppressed, on its cross-examination of defendant when that evidence was not brought out by the defense on his direct or cross-examination.

III. Whether it is plain error for the trial court to give an incomplete jury charge on the burden of proof element of the affirmative defense of excusable homicide, under Virgin Islands law.

## PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the title of the case.

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### OPINIONS BELOW

The opinions below consist of a Judgment and Commitment, an Order denying, in part, Petitioner's Motion to Suppress Evidence, and Findings of Fact and Conclusions of Law of the District Court of the Virgin Islands [Appendices "C" through "G"]; as well as the Sur Petition for Rehearing and the Judgment Order of the Court of Appeals for the Third Circuit, affirming the decisions of the District Court of the Virgin Islands. [Appendices "A" and "B"].

### JURISDICTION

The decision sought to be reviewed is the *Sur Petition for Rehearing*, of the Court of Appeals for the Third Circuit filed January 13, 1995.

Jurisdiction of the Court is found at Title 28 U.S.C. Section 1254(1) (1988).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*U.S. Constitution, Fourth Amendment*, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States statutes involving supervisory powers of the Supreme Court. 28 U.S.C.A. Sections 2071, 2072 (1988).

United States statutes involving the supervisory powers of the Court of Appeals. 28 U.S.C.A. Section 1254 (1988), 28 U.S.C.A. Section 1291 (1982).

V.I. Code Ann. tit. 14 Section 926, in pertinent part, provides:

> Section 926. Excusable homicide defined
>
> Homicide is excusable—
>
> (1) when committed by accident and misfortune, or in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;

## STATEMENT OF THE CASE

### Introduction

This case involves the criminal prosecution, conviction and commitment of Petitioner for a term of forty-one (41) years for murder, possession of a firearm and obstruction of a public officer in the discharge of his duty, based *entirely* upon evidence of a .9mm Glock firearm and other "derivative evidence" acquired by police investigators as result of a warrantless, non-consensual search of his apartment for evidence during their investigation of a reported accidental shooting of his girlfriend in that apartment on the morning of August 13, 1992.

At the conclusion of an evidentiary hearing, the trial court, in an *unprecedented* ruling, permitted the prosecution to introduce the illegally seized .9mm Glock firearm, as well as other "derivative evidence", acquired by the FBI and other expert witnesses, under an erroneous application of the *inevitable discovery* exception to the exclusionary rule. The trial court reasoned that even though the police failed to obtain a warrant from a neutral magistrate, and even though there were no exigent circumstances or evidence that the items would have been found by the police through a lawful independent source, the fact that they retroactively had sufficient probable cause to obtain a warrant, the issuance of which was inevitable, their warrantless search and seizure therefore constitutes reasonable and legally acceptable police procedure.

Second, the trial court, over objection, permitted the prosecution to use evidence of a shotgun and a rifle illegally seized during that warrantless search on cross-examination of Petitioner although no such evidence had been brought out by the defense, directly or indirectly, on his direct or cross-examination.

Third, during its charge, the trial court failed to instruct the jury on the burden of the prosecution to prove beyond a reasonable doubt the absence of the affirmative defense of "excusable homicide" under Virgin Islands law.

In the opinion of Petitioner, these rulings by the trial court not only constitute *plain error*, but are in direct conflict with the Fourth Amendment warrant requirement as articulated in *Nix v. Williams*, 467 U.S. 431 (1984) its progeny, and *U.S. v. Herrold*, 962 F.2d 1131 (3rd Cir. 1992). The failure of the trial court to give a complete jury charge on the burden of proof element of "excusable homicide" constitutes *plain error* under the teachings of *Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991).

**Factual and Procedural Predicate**

On August 13, 1992 at approximately 7:45 a.m. medical personnel and the police were called by Petitioner Frederick to his one bedroom apartment at 429 Estate Mt. Washington, Christiansted, St. Croix, United States Virgin Islands, to assist his girlfriend, Kemba Hendricks, who had been accidentally shot reportedly by a licensed .9mm Smith & Wesson pistol. Petitioner's mother, Marilyn Frederick, owned and occupied the main house on the premises.

Upon their arrival, the officers immediately took Frederick into custody and escorted him from the premises while the EMTs attended Kemba Hendricks, who was pronounced dead upon their arrival.

Approximately three hours later, several investigating officers initiated a warrantless non-consensual search of Petitioner's apartment for "evidence" of a crime. Lt. James Rhymer, the officer-in-charge, articulated the reasons for their decision to initiate this complete warrantless search of Petitioner's apartment as follows:

> THE WITNESS: Well when we got to the scene and there was nothing else we could do for the victim, we initiated a visual search. We started to think that if an automatic weapon was used, it would eject to the right, so we started looking to the right . . . of the bed and Officer Hitesman saw it (an expended shell casing) under the bed.

Officer Hitesman examined the expended shell casing and concluded that it might have been fired from a .9mm Glock instead of a .9mm Smith & Wesson. Therefore, the officers decided to continue their search of Petitioner's apartment for weapons and other items of evidentiary value. Upon searching above a seven foot high bedroom clothes closet, they found a .9mm semi-automatic Glock firearm beneath a box and clothes; as well as a rifle. They also recovered a sawed-off shotgun from inside a

kitchen closet and miscellaneous ammunition from within a drawer in the kitchen. The expended shell casing, the .9mm Glock, and the .9mm Smith & Wesson were analyzed by the Federal Bureau of Investigation and other forensic experts, who after reconstructing the incident, concluded that the shooting was a homicide.

The prosecution conceded that the search of Petitioner's apartment was conducted without a warrant. Initially, it argued that the items seized were admissible under the doctrines of ((a) actual and/or implied consent, (b) plain view, or (c) exigent circumstances.

A pretrial evidentiary hearing commenced before the Honorable John P. Fullam on November 5, 1993. The Court in a preliminary ruling held that the spent shell casing first found under the bed was in plain view, but that the Glock and shotgun were *illegally* seized because the prosecution had failed to present any evidence of actual or implied consent and because these items were not in plain view. Judge Fullam reserved ruling on the rifle. He also observed that the prosecution was not relying on the "inevitable discovery theory" and that he was inclined to reconsider his *preliminary* ruling as to the .9mm *Glock* if the prosecution

> . . . can come up with a theory that would either alter the evidence on consent or plain view, or if [it] can come up with some arguments inevitable to discovery, . . . [Appendix "G", p. 17a]

In an effort to take immediate advantage of this *advisory opinion*, the prosecution promptly filed a supplemental memorandum on November 8, 1993 which stated in part:

> In the event the court finds that the warrantless seizure of the .9mm Glock and the sawed-off shotgun were not authorized as one of the exceptions to the warrant requirement as was initially argued by the government, it is contended that the weapons should not be suppressed on the ground that they would inevitably have been discovered in any event.

At the conclusion of the evidentiary hearing held on November 8, 1993, Judge Fullam made the following *findings* [Appendix "F", pp. 12a-14a]:

> (a) the police were called to [his apartment] the scene of the shooting by Frederick; (b) by calling the police to the scene, Frederick made [the police] presence in the apartment lawful; (c) the police were, thus, entitled to seize as evidence anything which was in plain view; (d) the spent shell casing found under the bed was in plain view; (e) that Frederick's consent to have the police enter his apartment to recover the victim did not constitute a consent to conduct a *complete* search of his apartment; and (f) there was no evidence of express consent or implied consent to search given by Frederick or his mother.

Judge Fullam further reasoned:

> . . . once it became known to them [the officers] that (Petitioner's) version of the alleged accident was not acceptable, and once it was learned by them that the weapon which he said was used in the shooting was not the weapon used in the shooting, they obviously would have had not only a right to obtain a warrant but inevitable motive for obtaining a warrant and that warrant would have authorized them to search for the weapon (Glock) which was used in the shooting. [Appendix "F", p. 14a]

He continued:

> . . . I conclude that because they [the officers] had the place secured that it would not have been possible for anybody to remove the weapon before they came back with a warrant. And therefore, the discovery of the Glock weapon was inevitable. [Appendix "F", p. 15a]

Consequently, Judge Fullam granted Petitioner's motion to suppress the *rifle* and the *shotgun*, but denied his request to suppress the spent shell casing and the .9mm *Glock* pistol. Judge Fullam left open whether to sup-

press "any other items of evidence which may have been uncovered in Frederick's apartment". On the question raised regarding the "fruits of the illegal search", the court was silent. [Appendix "F", p. 15a]

Asserting that Judge Fullam had clearly misapplied the *inevitable discovery doctrine*, Petitioner prior to the commencement of the trial on December 20, 1993, renewed his motion to suppress, together with a motion *in limine* seeking to suppress all of the aforementioned evidence seized from his apartment, as well as "all findings and opinions rendered by the FBI or other experts which, in whole or in part, rely (sic) on the Glock . . ."

After a brief re-hearing before the Honorable James L. Watson, the shotgun ammunition seized from Petitioner's kitchen cabinet was suppressed. However, Judge Watson refused to disturb Judge Fullam's previous evidentiary ruling. [Appendix "E", p. 10a]

At trial, Petitioner raised the affirmative defense of excusable homicide by reason of accident and misfortune under Title 14 V.I.C. Section 926(1). On the prosecution's case-in-chief, the .9mm Glock firearm was admitted as well as certain "derivative evidence" or "fruits of the poisonous tree". For example, Special Agent Kenneth H. Whitter, an FBI expert on firearms and tool marks, testified that (1) the deformed bullet removed from the head of the deceased could have been fired from the .9mm *Glock*; (2) the expended casing was fired from the *.9mm Glock firearm* pistol; and (3) the deformed bullet was not fired from Petitioner Frederick's licensed Smith & Wesson .9mm pistol. Vincent DiMaio, an expert in *pathology* with a special expertise in wound ballistics, testified as to the mechanics involved when a bullet from the *.9mm Glock firearm* impacted Kemba Hendricks' face, the proximity of the .9mm Glock firearm to her right hand, and his conclusions as to the relative distances involved. Finally, the prosecution introduced a computer animated video tape to illustrate its theory as to how the

prosecution perceived the *.9mm Glock firearm* pistol might have been used during the shooting incident.

Petitioner testified on his own behalf. He extensively explained and illustrated how the accidental shooting occurred. Over the objection of Petitioner, the trial court permitted the prosecution to use evidence of the shotgun and the rifle illegally seized during the warrantless search on cross-examination of Petitioner although no such evidence had been brought out by the defense, directly or indirectly, on his direct or cross-examination.

Prior to the charge, Petitioner's counsel specially requested an instruction on the affirmative defense of "excusable homicide" by accident and misfortune under Title 14 V.I.C. Section 926 (1). The instruction given by the trial judge consisted only of the following:

> Homicide, that is to say, the killing of another person, is excusable under the law of the Virgin Islands when committed by accident and misfortune, or in doing any lawful act by means, with usual and ordinary caution, and without any unlawful intent.

Petitioner's counsel, who was at the time unaware of the ruling in the case of *Government of the Virgin Islands v. Smith,* 949 F.2d 677 (3rd Cir. 1991), did not object to this instruction. Counsel for the prosecution, likewise offered no guidance to the trial judge on the incompleteness of this critical charge.

At the conclusion of the trial the jury found Petitioner guilty as charged. His motions for a new trial and judgment of acquittal made pursuant to Rule 33 and 29, Federal Rules of Criminal Procedure were denied. [Appendix "D", pp. 8a-9a] He was sentenced to a term of forty-one (41) years imprisonment. [Appendix "C", pp. 6a-7a]

On appeal to the Court of Appeals for the Third Circuit, Petitioner's conviction was affirmed by Judgment Order dated December 16, 1994. [Appendix "B", pp.

3a-5a] After filing a petition for rehearing before the panel and suggestion for rehearing *in banc*, the Court of Appeals for the Third Circuit in an Order *Sur Petition for Rehearing* dated January 13, 1995, denied Petitioner's request. [Appendix "A", pp. 1a-2a]

This *Petition for Writ of Certiorari* follows.

## REASONS FOR GRANTING THE WRIT

### I. THE INEVITABLE DISCOVERY EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE, PROHIBITS THE WARRANTLESS SEARCH OF A PRIVATE HOME BY A POLICE INVESTIGATOR BASED SOLELY ON HIS PERSONAL BELIEF THAT PROBABLE CAUSE EXISTS AND THAT THE ISSUANCE OF A WARRANT BY A NEUTRAL MAGISTRATE, IF AN APPLICATION WAS TO BE MADE, IS INEVITABLE.

Recognizing that an individual's reasonable expectation of privacy from unauthorized government intrusion is constitutionally protected, *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984) and the Court of Appeals for the Third Circuit in *United States v. Herrold*, 962 F.2d 1131 (3rd Cir. 1992), thoroughly reviewed the procedural safeguards regarding police searches, in the absence of a warrant. *Herrold* at 1137 re-affirmed the principle that:

> Where an individual possesses a reasonable expectation of privacy in a given area, typically the government must obtain a warrant prior to searching that area. As the Supreme Court has stated,
>
> > searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.

> *Horton v. California*, 496 U.S. 128, 133 n.4, 110 S. Ct. 2301, 2306 n.4, 110 L.Ed.2d 112 (1990) (quoting *Katz v. United States*, 389 U.S. at 357, 88 S. Ct. at 514.

The Court in *Herrold* carefully explained the test that must be applied, by continuing to say:

> Thus, in this case if the government had to rely on the warrantless entry to uphold the search and seizure it would have the burden of demonstrating that the search and seizure were permissible under an exception to the Fourth Amendment's warrant requirement. *United States v. Morgan*, 743 F.2d 1158, 1162 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126, 85 L.Ed.2d 490 (1985); *Carter v. United States*, 729 F.2d 935, 940 (8th Cir. 1984); *United States v. Kane*, 637 F.2d 974, 979 (3d Cir. 1981). If the government could not make this showing then the exclusionary rule would generally bar the admission of the illegally obtained evidence. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L.Ed. 652 (1914).

Petitioner asserts a direct Fourth Amendment violation of his expectation of privacy as a result of the Government's failure to demonstrate that the search was legally permissible. He also insists that under the "fruit of the poisonous tree" doctrine, all derivative evidence acquired as a result of the unlawful search conducted by the police at his apartment should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471 (1963), *Segura v. United States*, 468 U.S. 796 (1984).

The trial court's decision to avoid the Fourth Amendment warrant requirement by invoking the "inevitable discovery" exception sweeps so broadly that it renders the warrant requirement meaningless. Simply stated, the trial court concluded that after seeing the shell casings, the police had probable cause to search; that if the police had requested a warrant, they would have received one; and that once they obtained a warrant, they would have

searched and found the weapons. Therefore, the court concluded, the discovery of the weapons was "inevitable," and the police should not be faulted for having disregarded the constitutionally mandated steps of obtaining a warrant.

If the trial court's logic is accepted by this Court, law enforcement officers will never have reason to obtain a warrant. Once an officer has satisfied himself that he has probable cause to search, he will be free to proceed without a warrant, confident that he can rely on the "inevitable discovery" doctrine. In substance, if this Court approves the "inevitable discovery" doctrine as applied by the District Court, the exception will devour the rule, and the warrant requirement will become meaningless.

The trial court's application of the "inevitable discovery rule" exception is unprecedented. No Federal case has ever held that probable cause to search a person's home or the inevitability of the issuance of a warrant, *ipso facto*, dispenses with the Fourth Amendment warrant requirement. The reason why such a prophylactic rule does not exist was explained in *United States v. Satterfield*, 743 F.2d 827, 846-847 (11th Cir. 1984) which stated:

> Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place. Our constitutionally-mandated preference for substituting the judgment of a detached and neutral magistrate for that of a searching officer, *United States v. Martinez-Fuerte*, 428 U.S. 543, 568, 96 S. Ct. 3074, 3087, 49 L.Ed.2d 1116 (1976), would be greatly undermined.

In addition, the trial court's decision to suppress the rifle and the shotgun because they were illegally seized is irreconcilable with its ruling that the .9mm Glock firearm pistol, recovered during the same search should be treated differently. ***Simply put, if the rifle and the shot-***

*gun were illegally seized and inadmissible, so was the .9mm Glock firearm pistol.*

Because the police officers conducted an illegal search of Petitioner's apartment for firearms and other evidence, deterrence from such future conduct can only be guaranteed by suppressing *all* the evidence. As the Court stated in *Herrold*, at 1144:

> Importantly, our result, which harmonizes the tainted warrant and independent source doctrines, will not provide the police with an incentive to avoid the warrant requirement. Rather, by its very nature it is only applicable where the police have in fact obtained a warrant. In addition, it will not give the police incentive to search first without a warrant, because *any information discovered in an unlawful search is useless to the police* in a subsequent warrant application. (Emphasis added)

As a result of the lower courts' rulings in Petitioner's case, the Territory's police officers *now* have every incentive to avoid the warrant required and to conduct warrantless searches and seizures in any private home based on the erroneous assumption that "probable cause for a warrant", and the inevitability of the issuance of a warrant, *ipso facto*, dispenses with their constitutional duty to obtain a warrant from a neutral magistrate.

Finally, the courts below completely overlooked the fact that application of the inevitable discovery rule exception involves a two-prong analysis: an *inevitable discovery* test, as well as *independent source* test. This two-prong analysis requires a finding that the government has established by a preponderance of the evidence that: (a) there was a reasonable probability that the .9mm Glock firarm would *inevitably* have been discovered by lawful means, and (b) that the lawful means, which would have made such discovery inevitable, were possessed by the police and were, in fact, being independently and actively pursued by them *prior* to the occurrence of the illegal conduct.

Here, while the .9mm Glock firearm might have been discovered if a search warrant had been lawfully obtained, the evidence fails to satisfy the second prong of this test. The police did not have an *independent source*. The investigators were not in possession of any other lawful means, nor were they in active lawful pursuit of the .9mm Glock firearm prior to the aforementioned illegal search and seizure. The "*inevitable discovery rule*" exception simply does not apply. Consequently, the .9mm Glock firearm and the fruits of that illegal search and seizure, i.e., the testimony of the FBI and the reconstruction expert and others, were clearly inadmissible.

For these reasons, the trial court holding represents an unprecedented and erroneous application of the "inevitable discovery rule" exception which undermines the Fourth Amendment warrant requirement.

## II. IT WAS PLAIN ERROR FOR THE TRIAL COURT TO PERMIT THE PROSECUTION TO USE EVIDENCE WHICH HAD BEEN ILLEGALLY SEIZED AND SUPPRESSED FOR IMPEACHMENT AND OTHER PURPOSES WHEN THAT EVIDENCE WAS NOT BROUGHT OUT BY DEFENDANT ON HIS DIRECT OR CROSS-EXAMINATION.

During the defense case-in-chief, Petitioner testified on his own behalf. At no time during his testimony did he make reference to the rifle or shotgun which had been illegally seized by the police and suppressed by the trial court. Despite Petitioner's attempt to maintain a clean record on these items, the trial judge permitted the prosecutor on cross-examination over the objections of counsel to inquire whether petitioner possessed or owned the rifle and shotgun which had been previously ordered suppressed by the court. At that point in the trial, Petitioner had no choice but to admit ownership of these hidden weapons.

The ultimate determination of materiality of evidence is a question of law subject to plenary review. *United*

*States v. Bagnall*, 907 F.2d 432, 435 (3rd Cir. 1990). The Supreme Court has made clear that the prosecution's use of illegally obtained evidence is restricted to impeach petitioner's testimony on cross-examination which was reasonably suggested by his testimony on direct examination. *See, Michigan v. Harvey,* 110 S.Ct. 1176, 1177-78; *Oregon v. Hass,* 420 U.S. 714, 722-24 (1975); *U.S. v. North*, 920 F.2d 940, 948 (D.C. Cir. 1990) (dictum), cert. denied, 111 S. Ct. 2235 (1991); *U.S. v. Torres*, 926 F.2d 321, 323 (3d Cir. 1991); *U.S. v. Havens*, 446 U.S. 620, 627-28 (1990); Federal Rules of Evidence, 403.

Since the record is void of any references by Petitioner as to the rifle or shotgun in his opening, direct, or cross-examination, there was no legally cognizable basis for the trial judge to allow the prosecution to discuss these unduly prejudicial items before the jury.

Moreover, based on the number of weapons in evidence, the prosecution was able to portray Petitioner as a liar for having illegal firearms hidden in his apartment. The Government was able to argue that Petitioner's scheme was to "hide the evidence" of the murder, and that his claim of accidental shooting was thus a "big lie".

In the opinion of Petitioner, when the trial court permitted the prosecution unlimited scope on cross-examination, it committed plain error requiring a reversal of his conviction.

## III. IT IS PLAIN ERROR FOR THE TRIAL COURT TO GIVE AN INCOMPLETE CHARGE TO THE JURY ON THE BURDEN OF PROOF ELEMENT OF EXCUSABLE HOMICIDE, UNDER VIRGIN ISLANDS LAW.

During the opening statement, Petitioner raised the affirmative defense of excusable homicide by means of an accidental shooting and misfortune, admitting that his care-

less mishandling of the .9mm Glock firearm was the cause of death. Throughout the trial Petitioner offered evidence on this central theme, and he took the stand devoting considerable time explaining and illustrating how the accident occurred. Consistent with Petitioner's theory of the case, his counsel requested that the jury be charged that "excusable homicide" by means of accident and misfortune was an absolute defense under Virgin Islands law, and that such a finding by the jury mandates an acquittal.

The Court of Appeals for the Third Circuit has provided guidance as to the necessity for complete jury instructions on the burden of proof element of the affirmative defense of *excusable homicide* under Virgin Islands law. *Government of the Virgin Islands v. Smith*, 278 F.2d 169 (3d Cir. 1960) (epileptic seizure at the time of a alleged vehicular homicide) and *Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991) (self-defense to murder) control this issue. Moreover, in *Smith, id.*, at 681-682, the Court re-affirmed prior decisions where it held "that Virgin Islands law requires the government to disprove affirmative defenses once some evidence has been presented on the issue", citing *Government of the Virgin Islands v. Bellott*, 495 F.2d 1391, 1397 (3rd Cir. 1974) (insanity defense), and held that the failure to give a *complete* jury instruction on the burden of proving the absence of self-defense beyond a reasonable doubt constituted "plain error".

Petitioner's counsel specifically requested an instruction on excusable homicide by means of accident and misfortune consistent with Virgin Islands law. The only instruction the jury received was the following:

> Homicide, that is to say, the killing of another person, is excusable under the law of the Virgin Islands when committed by accident and misfortune, or in doing any lawful act by means, with usual and ordinary caution, and without any unlawful intent.

The trial judge made no mention of the government's burden of proving the non-existence of excusable homicide which was the sole defense. In the absence of such a charge, the jury might have concluded that Petitioner failed, in his efforts, to prove his case of excusable homicide and, thus, convicted him.

In *Smith, id.* at 681, the Third Circuit mandated that the jury be instructed separately regarding the prosecution's burden of proof on that issue, and stated that failure to provide a burden of proof instruction on self-defense constitutes *plain error* even in the absence of an objection from the defense.

In the opinion of Petitioner, the trial court failure to give a complete instruction on the burden of proof element of excusable homicide was plain and reversible error. Consequently, the decision by the appellate court to affirm Petitioner's conviction is clearly inconsistent with its own prior decisions. *See, Government of the Virgin Islands v. Smith, infra.*

## CONCLUSION

For all the reasons stated above, Petitioner respectfully urge this Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 94-7153

---

GOVERNMENT OF THE VIRGIN ISLANDS

v.

LYNDON FREDERICK
*Lyndon B. Frederick, Appellant*

---

(D.C. Crim. No. 93-cr-00052)

---

SUR PETITION FOR REHEARING

---

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS,
McKEE and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the deci-

sion having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Sloviter
Circuit Judge

Dated: Jan. 13, 1995

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 94-7153

---

GOVERNMENT OF THE VIRGIN ISLANDS

v.

LYNDON FREDERICK
*Lyndon B. Frederick, Appellant*

---

Appeal from the District Court of the Virgin Islands
Division of St. Croix
D.C. Criminal No. 93-cr-00052
(Honorable James L. Watson)

---

Argued December 6, 1994

Before: SLOVITER, *Chief Judge,*
SCIRICA and COWEN, *Circuit Judges*

---

JUDGMENT ORDER

---

After considering the contentions raised by appellant, to wit, that:

1. The court (a) erroneously applied the inevitable discovery exception to the exclusionary rule; and, (b) impermissibly received into evidence an expended shell casing and a .9mm semi-automatic Glock pistol recovered during an illegal search of appellant's apartment, as well as the fruits of that illegal search;

2. The court erred (a) by allowing Dr. DiMaio, qualified only as a forensic pathologist with special expertise in wound ballistics, to go beyond his field of expertise and give speculative testimony in his attempt to reconstruct the entire scene and shooting incident; and, (b) by permitting the prosecution to introduce, through Dr. DiMaio, a hearsay, computer enhanced, animated videotaped reconstruction version of the scene and shooting incident;

3. The court erred when it granted permission to the prosecution to cross-examine appellant on the issue of his possession or ownership of the sawed-off shotgun and .410 rifle, which were suppressed as having been illegally seized by the police officers;

4. The court erred in failing to dismiss and/or properly instruct the jury on the charge of obstruction of a police officer in the discharge of his lawful duty, as is required under Virgin Islands laws;

5. Appellant's right to a fair and impartial trial was otherwise violated by the cumulative effect of prosecutorial misconduct which resulted in hearsay, irrelevant, and other unduly prejudicial evidence to go to the jury;

6. The court erred when it failed to instruct the jury on the burden of proof on excusable homicide; and,

7. The sentence imposed on appellant is excessive, it is

ADJUDGED AND ORDERED that the judgment of the district court entered March 3, 1994, be and is hereby AFFIRMED.

BY THE COURT,

/s/ Sloviter
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. DOUGLAS SISK
Clerk

[Dec. 16, 1994]

**APPENDIX C**

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

---

Criminal No. 93-00052

GOVERNMENT OF THE VIRGIN ISLANDS,
*Plaintiff,*

v.

LYNDON B. FREDERICK,
*Defendant.*

---

JUDGMENT AND COMMITMENT

On the 2nd day of March, 1994, Assistant United States Attorney for the Government, James A. Fitzner, and the defendant appeared in person and with counsel, Mark L. Milligan, Esquire.

The defendant was charged with:

COUNT I — MURDER SECOND DEGREE

COUNT II — UNLAWFUL POSSESSION OF A MACHINE GUN DURING A CRIME OF VIOLENCE

COUNT III — OBSTRUCTION OF JUSTICE

At arraignment the defendant pleaded Not Guilty and demanded a jury trial. A jury was selected on December 20, 1993 and the trial began that day and concluded on December 27, 1993. The jury returned a verdict finding the defendant Guilty as charged.

The matter having been referred to the Probation Officer for a pre-sentence investigation and report, which has been filed with the Court, and the defendant having been given an opportunity to make a statement on his behalf, and there being no legal cause why sentence should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant be and he is hereby committed to the custody of the Director of the Bureau of Corrections or his authorized representative for imprisonment for a term of thirty (30) years on Count I; ten (10) years on Count II and one (1) year on Count III. Five (5) years of the sentence imposed on Count II shall be served without probation or parole. The sentence imposed on Counts I and II are to be served consecutive to each other and concurrent with the sentence imposed on Count III.

It is ADJUDGED that the defendant be given credit for time served in post-trial detention, to wit: fifty-nine (59) days.

It is ADJUDGED that the defendant's bond is discharged and canceled, and all sureties are hereby released.

It is ORDERED that the Clerk deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer, which copy shall serve as the commitment of the defendant.

DATE OF IMPOSITION OF SENTENCE: March 2, 1994

DATED this 3rd day of March, 1994.

ENTER:

/s/ James L. Watson
JAMES L. WATSON
U.S.D.J.
Sitting by Designation

**APPENDIX D**

[Filed Jan. 26, 1994]

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

---

Criminal No. 1993-52

(Watson, SDJ by designation)

GOVERNMENT OF THE VIRGIN ISLANDS,
*Plaintiff,*

v.

LYNDON FREDERICK,
*Defendant.*

---

ORDER

The court has before it defendant's motion for a new trial and judgment of acquittal pursuant to Rules 33 and 29 of the Federal Rules of Criminal Procedure, together with the government's opposition and the defendant's reply.

The motion is premised on the contention that it was error for the court to admit the murder weapon, a Glock pistol, as well as a spent casing from a bullet fired by the Glock, over the objection that they were obtained by an illegal search. The motion is also based on a contention that it was error to permit cross-examination of the defendant as to a rifle and sawed-off shotgun found in his premises.

The court adheres to its view that the spent casing was in plain view. The court remains of the opinion that the Glock pistol would inevitably have been found in a

lawful search. Such a search would undoubtedly have been conducted when it became clear that the licensed Smith & Wesson pistol presented to the police by defendant, and identified by him as the weapon that had fired the fatal shot, could not have produced the marks on the casing found on the scene. As soon as further study of the casing indicated the existence of another weapon, or those marks were seen to be of the distinctive type produced by a Glock, a lawful search would have been conducted and the hastily concealed Glock would have been found. That development was inevitable in the view of the court.

The court is also of the opinion that the cross-examination as to the possession of the seized shotgun and rifle was proper, particularly for impeachment purposes in light of defendant's testimony that he only owned one weapon.

As to the motion for judgment of acquittal on the charge of obstructing a public officer in the discharge of his duties, the evidence overwhelmingly supported that charge. The ultimate failure of defendant's attempts to mislead the police is of no consequence.

For the reasons given above, defendant's motions are hereby denied.

/s/ James L. Watson
JAMES L. WATSON
Senior Judge
Sitting by designation

Dated: January 25, 1994

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

---

Criminal No. 1993/0052

*Suppression Hearing—III*

GOVERNMENT OF THE VIRGIN ISLANDS,
*Plaintiffs,*

vs.

LYNDON FREDERICK,
*Defendant.*

---

Christiansted, St. Croix
December 20, 1993

BEFORE: THE HONORABLE JAMES L. WATSON
U.S. DISTRICT JUDGE

* * * *

MR. FITZNER: Your Honor, could I be heard real briefly?

THE COURT: To make a long story short, I grant the motion to suppress with respect to the rifle and the shotgun. I deny the motion to suppress to the shell casing, which I am sure he's referring to the shell casing from the Glock, not these sawed-off shotgun shells.

Yes, sir?

MR. FITZNER: Your Honor, just to make the situation clear to the Court as I can, there was a lot of ammunition found that was not even addressed by the Court, as shown in this transcript. You might have

heard Jonothan Hitesman state under oath here—you asked him a question about where was the magazine for this Glock and I believe there were other magazines. At least the inference is from his testimony.

Additionally there were other kinds of ammunition, including ammunition compatible for the Glock, found I believe in a military-type ammunition box which was also found in the apartment. That was never addressed at the other hearing and I do not believe it was part of the amended motion to suppress.

* * * *

**APPENDIX F**

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

---

Criminal No. 1993/052

GOVERNMENT OF THE VIRGIN ISLANDS,
*Plaintiff,*

vs.

LYNDON B. FREDERICK,
*Defendant.*

---

Christiansted, St. Croix
November 8, 1993

---

BEFORE: The Honorable John P. Fullam
U.S. District Judge

* * * *

COURT'S FINDINGS

THE COURT: All right. I will make my ruling and I can do it now.

I find that the police were called to the scene of a shooting by the defendant, that the shooting took place in the defendant's apartment. And I find that obviously by calling the police to the scene, he made their presence in the apartment apparently lawful and permissible. This entitled the police to seize as evidence anything which was in plain view.

The first question to be addressed, therefore, was what was in plain view. I find that the .9 millimeter Smith & Wesson which was delivered to the police or pointed out to the police by the defendant plainly qualifies as having been in plain view and having been delivered by consent, in any event.

Contrary to the defendant's contention, I also find that the shell casing under the bed was in plain view and they had a right to seize that. I am unable to find that the rifle was in plain view. It was borderline but, in any event, given the testimony of the police officer that it was necessary to move it in order to get a photograph of it so the camerman could see it, I think it would be difficult to concede that it was in plain view until it was discovered and moved. So I do not find that the rifle was in plain view.

The sawed-off shotgun obviously was not in plain view. It was necessary to pry the cover off a recessed compartment in order to see it. And it's equally obvious that the Glock weapon was not in plain view since it was hidden under a box and under some clothing on top of a closet.

The next question is whether any of these items can be considered to have been obtained by consent. I find that the consent did not extend to a consent to rifle through and conduct a complete search of the apartment. I note that the police seemed to have been operating under the impression that once they are called to the scene that gives them carte blanche to do anything which they feel like doing, which unfortunately was not the case.

There is no expressed consent certainly from anybody and I find in the circumstances of this case no implied consent since the defendant himself was outside on the ground in handcuffs while the search was performed. And since the defendant's mother, A, did not have permission to grant consent with respect to that apartment and, B, did not grant consent in any event and, C, was ordered out of the apartment before the search began, I find that

the vague evidence to the effect that she was in and out thereafter does not give rise to an implied consent on her part to the search that was being conducted. Her interest obviously was in trying to get medical help for the victim and worrying about the very tragic events which had occurred.

Therefore, that leaves as the only possible basis on which the Government can prevail the question of inevitable discovery. And, as I understand the law under the *Nicks* (sic.) case and the Third Circuit case that preceded it, if the Government can show by a preponderance of the evidence that the evidence sought to be suppressed would inevitably have been discovered legally, then the fact that they actually discovered it illegally does not warrant exclusion of the evidence at trial.

I find that in the normal course of police procedure, the police are entitled, when called to the scene of a crime, to secure the premises. And it's quite apparent that once it became known to them that the defendant's version of the alleged accident was not acceptable, and once it was learned by them that the weapon which he said was used in the shooting was not the weapon upon used in the shooting, they obviously would have had not only a right to obtain a warrant but inevitable motive for obtaining a warrant and that warrant would have authorized them to search for the weapon which was used in the shooting.

I conclude that they had enough information at the scene to realize that the defendant's explanation was not correct. And based on the testimony of the witness here this morning, Mr. Hitesman, I find that they actually did believe at the scene of the crime that the weapon which the defendant said had been used was not the weapon that—was probably not the weapon which had discharged the shell casing. And given the proximity of the shell casing to the scene on the murder, I conclude that they believed at that time that it was probable that some weapon other than the Smith & Wesson had been used

in the shooting. They, therefore, had an open and shut motive for obtaining a search warrant and would have had open and shut grounds to be issued a search warrant if they had been paying any attention to what the law is and had given thought to the need for a warrant.

I conclude that because they had the place secured that it would not have been possible for anybody to remove the weapon before they came back with a warrant. And, therefore, the discovery of the Glock weapon was inevitable.

I do not reach that conclusion, however, with respect to the other weapons. I conclude that if the police had proceeded as they normally would have, they would have searched the apartment for a Glock weapon which they believe was used in the shooting and it is likely that they would have found the Glock weapon at least as—would have found the Glock weapon and would have had no reason to pry open the recessed compartment where they found the sawed-off shotgun. They would undoubtedly have found the shells for the sawed-off shotgun because they would have check the drawers, I presume, but I don't know the relevance of those shells to any issue in this case, anyway.

To make a long story short, I grant the Motion to Suppress with respect to the rifle and the shotgun. I deny the Motion to Suppress with respect to the shell casing and the Glock semi-automatic weapon.

I express no view as to the implications of this ruling with respect to any other items of evidence which may have been uncovered in the apartment but which were not specified in the Motion to Suppress, and I leave all such issues to the tender mercies of the judge who will try the case.

(Whereupon, the proceedings were concluded.)

## APPENDIX G

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

---

Crim. No. 93-52

GOVERNMENT OF THE VIRGIN ISLANDS,
*Plaintiff,*

v.

LYNDON B. FREDERICK,
*Defendant.*

---

November 5, '93

---

TRANSCRIPT OF SUPPRESSION HEARING

BEFORE THE
HONORABLE JUDGE JOHN P. FULLAM

* * * *

THE COURT: I'll be available if you want to present him. It's your case, not mine.

MR. FITZNER: I guess I wouldn't see any need to do it, Judge, but it depends on your ruling in this case. If it's a close case, I would request an opportunity.

THE COURT: I'll be glad to tell you which way I'm leaning. I don't see any conceivable way you can get the sawed-off shotgun into evidence. I don't see any conceivable way you can get the Glock into evidence

unless somebody can support an argument which has not been made yet. Let me give you my thoughts.

Obviously, the police were unlawfully on the premises. And they had a right to be in the apartment, they a right to be in the bedroom. Obviously that carries with it the right to seize any evidence which is in plain view.

I conclude that the shell casing found under the bed was in plain view. And although it's a close question, I think it's probable that the rifle found on top of the closet was in plain view, or at least the butt of it was.

Certainly neither the Glock nor the shotgun was in plain view. So the next question is was there consent to the search. And I don't see how you get consent here.

The final question is, which is the one which has not been addressed, and that is would this evidence, the Glock and the shotgun, have inevitably been discovered anyway?

It seems to me obvious that any reasonable, competent police officer would have secured the crime scene and obtained a search warrant and there is little or no possibility that anything could have happened to remove these weapons until they did search the place.

The real issue is whether by taking the shortcut that they took they have messed up their ability to use those two items of evidence. If you can come up with a theory that would either alter the evidence on consent or plain view, or if you can come up with some arguments inevitable to discovery, I would be happy to hear them.

MR. FITZNER: I wonder if I could, I submitted a brief this morning, I don't know if The Court has it.

THE COURT: It doesn't saying anything about discovery.

SUPREME COURT, U.S.
FILED
JUN 26 1995
CLERK

(2)

No. 94-1666

# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

LYNDON B. FREDERICK, PETITIONER

*v.*

GOVERNMENT OF THE VIRGIN ISLANDS

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

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22 pp

## QUESTIONS PRESENTED

1. Whether the district court was required to suppress a loaded firearm that the police found in petitioner's bedroom closet after petitioner called the police to his home to report a shooting.

2. Whether the prosecutor made improper use of illegally obtained evidence during his cross-examination of petitioner.

3. Whether the district court correctly instructed the jury on excusable homicide under Virgin Islands law.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-1666

LYNDON B. FREDERICK, PETITIONER

*v.*

GOVERNMENT OF THE VIRGIN ISLANDS

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINION BELOW

The order of the court of appeals (Pet. App. 3a-5a) is unpublished, but the judgment is noted at 46 F.3d 1116 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on December 16, 1994. A petition for rehearing was denied on January 13, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on April 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the District of the Virgin Islands, peti-

tioner was convicted of second degree murder, in violation of V.I. Code Ann. tit. XIV, §§ 921, 922(b) (1964) (Count 1); unlawful possession of a machine gun (a Glock semi-automatic pistol), in violation of V.I. Code Ann. tit. XIV, §§ 2253(b) and (d) (Supp. 1994) (Count 2); and obstruction of justice, in violation of V.I. Code Ann. tit. XIV, § 1508 (1964) (Count 5). He was sentenced to 40 years' imprisonment. The court of appeals affirmed. Pet. App. 3a-5a.

1. In the morning of August 13, 1992, petitioner telephoned the police to report a shooting at his home in St. Croix, Virgin Islands. 11/5/93 Tr. 5.[1] When Officers Benjamin Rios and Darius George arrived at the scene, petitioner met them outside the house and told them that he had shot his girlfriend. 1 Tr. 27-29. Petitioner then led the officers inside the house and pointed them to the bedroom. *Id.* at 29, 53. As the officers walked through the main part of the house to petitioner's apartment, Officer George saw a Smith & Wesson nine-millimeter handgun and a magazine clip on a table just outside petitioner's bedroom. 12/20/93 Tr. 29, 32, 44, 47.

When the officers entered the bedroom, they saw petitioner's mother, sitting on the bed and cradling the head of petitioner's girlfriend, Kemba Hendricks, who had been shot beneath the left eye. 1 Tr. 29-30,

---

[1] The suppression hearing was conducted on November 5, November 8, and December 20, 1993. Trial was conducted from December 22 to December 27, 1993. Numerical references to volumes of the transcript refer to the transcript of the trial. "3A Tr." and "3B Tr." refer to the transcripts of the December 22, 1993, morning and afternoon trial proceedings, respectively.

33-34, 56. Petitioner told the officers that a gun had accidentally discharged when he leaned over to kiss Hendricks. Officer Rios asked petitioner what weapon had discharged. Petitioner replied, "with this," grabbed the Smith & Wesson handgun from the table and attempted to throw the gun out the door. Officer Rios seized the weapon, and Officer George seized the loaded magazine clip from the table. Petitioner was taken outside the house and handcuffed. 1 Tr. 30-31, 36-37, 43-44, 46, 48, 56-57, 59.

As petitioner was being handcuffed, other officers arrived and entered the bedroom. 1 Tr. 58-59; 2 Tr. 5-6. Forensic Investigator Jonathan Hitesman found a spent shell casing from a nine-millimeter weapon underneath the bed. 11/8/93 Tr. 2, 4. After looking at the shell casing, Hitesman concluded that it had been fired from a Glock firearm, and not from petitioner's Smith & Wesson handgun. Hitesman observed that the shell casing had a "dug-in groove" peculiar to Glock weapons, and not the "smooth round impression" made by other weapons. *Id.* at 4-6, 13-14, 17.

Officer James Rhymer observed a rifle butt resting on the shelf of an open closet, about four to five feet from the bed. The rifle butt was flush with the edge of the shelf, which was approximately six to seven feet high. When Rhymer stood on a chair to inspect the rifle, he saw something underneath a box on the shelf on the other side of the closet. 11/5/93 Tr. 61-63, 70, 72; 12/20/93 Tr. 3. Rhymer lifted the box, retrieved a weapon from underneath the box, and handed the weapon to Hitesman, who saw that it was a nine-millimeter Glock semi-automatic pistol, loaded with a magazine clip containing six bullets,

one of which was in the firing chamber. *Id.* at 7-11, 13. The police also found a sawed-off shotgun in a boarded-up cabinet next to the stove in the kitchen (11/5/93 Tr. 16-18) and ammunition for the shotgun in a kitchen drawer (*id.* at 20-21; 11/8/93 Tr. 18; 12/20/93 Tr. 14).

While the police were present in petitioner's apartment, petitioner's mother went "back and forth" between the apartment and the main part of the house, to which the apartment was attached. 11/5/93 Tr. 74-75; 11/8/93 Tr. 11-12, 14-15. Petitioner's mother was "in and out" of the apartment while the police were searching but made no objection to the search. 11/8/93 Tr. 15.

At the police station, petitioner was advised of his *Miranda* rights and, after signing a written waiver, told the police that the gun had discharged accidentally. He stated that, after dressing on the morning of August 13, he retrieved his Smith & Wesson pistol, for which he had a license, from underneath the mattress. He then reached over the bed to give Hendricks a kiss and to tell her that he was leaving, when the gun accidentally went off. 1 Tr. 70-80. In a subsequent videotaped statement, petitioner told the police that Hendricks had been lying on her left side facing him when he leaned over to kiss her. 3A Tr. 80; 3B Tr. 85. Petitioner demonstrated Hendricks's position, and indicated that her right hand had been only a few inches from her head. 2 Tr. 219-221, 222-223. Petitioner repeated his earlier statement that he shot Hendricks with the Smith & Wesson, and he denied owning any other weapons. 3B Tr. 129-130.

2. Before trial, petitioner moved to suppress the weapons and ammunition seized during the search of his apartment. The district court suppressed the rifle, the sawed-off shotgun, and the shotgun ammunition, but denied the motion to suppress the Smith & Wesson, the Glock, and the shell casing found underneath the bed. Pet. App. 10a-11a, 12a-15a. The court first found that the police were lawfully on the scene of the homicide, having been called there by petitioner, and were therefore entitled to seize evidence in plain view, including the Smith & Wesson and the shell casing. *Id.* at 12a-13a. The court then ruled that the sawed-off shotgun was not in plain view, because it had been necessary for the police to pry off the cover of a recessed compartment to see it (*id.* at 13a), and that the rifle found on the closet shelf, although "borderline," was also not in plain view because it was necessary to pull it out further from the shelf to photograph it (*ibid.*). The court also held that the Glock was not in plain view, "since it was hidden under a box and under some clothing on top of a closet." *Ibid.* The court further found that neither petitioner nor his mother had expressly or impliedly consented to the search for the weapons, except for the Smith & Wesson. *Id.* at 13a-14a.

The district court ruled, however, that the Glock should not be suppressed, because it inevitably would have been discovered lawfully. The court reasoned that, once Officer Hitesman concluded that the Smith & Wesson tendered by petitioner as the weapon used in the shooting did not match the spent shell casing found underneath the bed, the police knew that some other weapon used in the homicide was still in petitioner's apartment. Pet. App. 14a-15a. Accordingly, the court concluded, the police "had an open and shut

motive" for obtaining a warrant, and "would have had open and shut grounds to be issued a search warrant." *Id.* at 15a. The court also noted that, because the police had secured the crime scene, "it would not have been possible for anybody to remove the weapon before they came back with a warrant." *Ibid.* Accordingly, the court held that the police would have inevitably found the Glock pistol during the course of a search with a warrant. *Ibid.*

3. a. At trial, the evidence established that Hendricks was killed with a bullet from a nine-millimeter Glock pistol, and that the bullet casing found underneath the bed had come from a nine-millimeter Glock pistol. 2 Tr. 118-125. Forensic pathologists testified that Hendricks sustained a gunshot wound on the left side of her nose, and that the gun was fired from a distance of approximately two feet from her face. 3A Tr. 27-28, 36-37, 45-46. The evidence also established that Hendricks was seated on the bed at the time she was shot, with her right arm extended forward in front of her face, and (based on the soot marks on Hendricks's palm) that her hand was close to the muzzle of the gun at the time it was fired—either hitting the barrel or grabbing and holding it. 2 Tr. 82-83; 3A Tr. 38, 44-45, 49-52, 82-84.

Petitioner testified in his own defense. He claimed that he had acquired the Glock pistol one week before the shooting and had hidden it under the mattress. 3B Tr. 120-126, 144. He testified that, on the morning of the shooting, he rose at approximately 7:30 a.m., showered, and dressed. Because Hendricks earlier had told him that she planned to clean up the apartment that day, and because he did not want her to find the Glock while she was cleaning, he removed it from underneath the mattress of the bed, intending

to secure it in the closet. *Id.* at 66-68, 145-146, 147-148. Before doing so, he leaned over Hendricks, who was asleep, to kiss her. *Id.* at 69-71. As he leaned over the bed, the gun accidentally discharged. *Id.* at 69-73, 151-156. He stated that, when he realized that Hendricks had been shot, he moved her to a sitting position on the bed and telephoned for an ambulance and the police. *Id.* at 73-74. He then picked up the Glock and placed it on the shelf where he had originally intended to put it. He claimed that he hid the Glock because he had no license for it. 4 Tr. 20, 24-25.

b. During cross-examination, the prosecutor asked petitioner whether he had weapons other than the Glock pistol in his apartment on August 13. 3B Tr. 126. The district court sustained an objection to that question. *Id.* at 127. At a sidebar conference, the prosecutor explained that he intended to impeach petitioner with evidence of the suppressed rifle and shotgun if petitioner denied possessing other guns. Defense counsel objected that he had not touched on the area during his direct examination of petitioner. The court again sustained the objection to the prosecutor's question, but did not prevent the prosecutor from cross-examining petitioner concerning his post-arrest statement to the police. *Id.* at 127-129.

Petitioner admitted, under cross-examination, that, in his videotaped statement to the police, he falsely stated that he had shot Hendricks with his Smith & Wesson and that he owned no other weapons. 3B Tr. 129. The following exchange occurred:

> Q. That wasn't true because you had the Glock; correct?
>
> A. It wasn't true because I know when the police had came to the scene that what I would

have been getting in trouble for was the Glock, so, yes it wasn't the Glock I said.

Q. That's not my question. My question is when you were asked by the police officer, Ramirez, do you own any other weapons, your answer was no; correct?

A. That was in the video statement.

Q. Yes, sir, and your answer was no?

A. Yes.

Q. And it was not true because you did own other weapons?

A. Yes.

Q. Weapons other than this Glock at issue right now?

A. Yes.

Q. What other weapons did you own?

A. I had an antique rifle and an old shotgun.

* * * * *

Q. So when you told Officer Ramirez no, you had no other weapons beside your Smith & Wesson, in fact you had three other weapons; correct?

A. Yes, I did.

*Id.* at 129-130, 132. Defense counsel did not object to that questioning.

c. The district court charged the jury that, to establish second-degree murder, the government was required to prove that petitioner unlawfully caused Hendricks's death, and that he acted willfully and with malice aforethought. 6 Tr. 95-98. The court instructed the jury that "malice aforethought" meant "either an intent, at the time of the killing, willfully to take the life of a human being, or an intent will-

fully to act in callous and wanton disregard of the consequences to human life." *Id.* at 96. The court further instructed the jury as follows:

> Homicide, that is to say, the killing of another person, is excusable under the law of the Virgin Islands when committed by accident and misfortune, or in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

*Id.* at 98. Petitioner did not object to that charge.[2]

4. On appeal, petitioner argued, *inter alia*, that the Glock should have been suppressed as the fruit of an illegal search, and that the district court had erroneously applied the inevitable discovery exception to the exclusionary rule; that the district court had improperly allowed the government to cross-examine him concerning his possession of the sawed-off shotgun and the rifle; and that the district court had improperly failed to instruct the jury as to the bur-

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[2] Petitioner had requested that the district court give the following charge to the jury (C.A. App. 642-A):

> Homicide is excusable—
>
> (1) when committed by accident and misfortune, or in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent; or
>
> (2) when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

That instruction was not included in the jury instructions as proposed by the court. Petitioner's counsel was invited to comment on the proposed instructions, and, during the charge conference, expressed satisfaction with them. C.A. Supp. App. 531.

den of proof on excusable homicide. The court of appeals summarily affirmed petitioner's convictions. Pet. App. 3a-5a.

**ARGUMENT**

1. Petitioner contends (Pet. 9-13) that the district court should have suppressed the Glock as the fruit of a warrantless search, and that it erred in relying on the "inevitable discovery" exception to the exclusionary rule in ruling that the gun was admissible. Further review of those contentions is not warranted.

a. The inevitable discovery doctrine permits illegally seized evidence to be admitted at trial if the government establishes "that the information ultimately or inevitably would have been discovered by lawful means." *Nix* v. *Williams*, 467 U.S. 431, 444 (1984); see *Murray* v. *United States*, 487 U.S. 533, 539 (1988). In this case, the trial court noted that the police had secured petitioner's apartment after the murder; that they possesed information indicating that the weapon used in the murder was still in that apartment; that they had clear reason to seek a search warrant, to find the murder weapon; and that they had sure grounds for obtaining a warrant upon application. Based on those facts, the district court held that the discovery of the Glock during a warrant-authorized search would have inevitably occurred in the course of the investigation. Pet. App. 15a.

Petitioner challenges that conclusion, arguing (Pet. 11) that, "[i]f the trial court's logic is accepted by this Court, [a] law enforcement office[r] will never have reason to obtain a warrant" whenever he "has satisfied himself that he has probable cause to

search." But in affirming the judgment, the court of appeals did not expressly rely on the inevitable discovery rationale and did not explicate the factors that entered into its rejection of petitioner's claims that "the [trial] court (a) erroneously applied the inevitable discovery exception to the exclusionary rule; and, (b) impermissibly received into evidence * * * a .9mm semi-automatic Glock pistol recovered during an illegal search of [petitioner's] apartment." Pet. App. 4a. Rather, the Third Circuit summarily affirmed petitioner's convictions, and its ruling therefore does not establish precedent in that circuit on the inevitable discovery issue.

There is some disagreement among other courts of appeals about the circumstances in which the inevitable discovery doctrine may be invoked to admit evidence seized during an unlawful, warrantless search when it is certain that a warrant would have been issued had it been sought. Compare, *e.g.*, *United States* v. *Buchanan*, 910 F.2d 1571, 1574 (7th Cir. 1990) (affirming admission of evidence under inevitable discovery doctrine when warrant could have been obtained) with *United States* v. *Johnson*, 22 F.3d 674, 683 (6th Cir. 1994) (rejecting application of inevitable discovery doctrine). See also *United States* v. *Cherry*, 759 F.2d 1196, 1205-1206 (5th Cir. 1985) ("prosecution must demonstrate both a reasonable probability that the evidence would have been discovered in the absence of police misconduct and that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation"); *United States* v. *Silvestri*, 787 F.2d 736, 742-746 (1st Cir. 1986) (rejecting firm requirements for application of the inevitable discovery doctrine, but suggesting in dicta

that if no warrant was obtained, active pursuit of one might be required), cert. denied, 487 U.S. 1233 (1988); *United States* v. *Boatwright*, 822 F.2d 862, 864-865 (9th Cir. 1987) (suggesting case-by-case approach to the issue, with background presumption that "the doctrine requires that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself").

The Third Circuit has not spoken to this issue. In *United States* v. *Herrold*, 962 F.2d 1131, cert. denied, 113 S. Ct. 421 (1992), the Third Circuit concluded that "an inevitable discovery analysis is inappropriate" when the police have seized evidence, pursuant to a warrant, after having previously observed that evidence during an illegal warrantless search. 962 F.2d at 1139; see also *id.* at 1143 n.12. Rather, the court ruled the evidence admissible under the separate, but related, "independent source" doctrine. *Ibid.* It therefore remains unclear how the Third Circuit would apply the inevitable discovery doctrine in a case in which a warrant was not issued after the initial unlawful search. And because the court did not provide an analysis of that doctrine here (or expressly rely upon it), this Court's review of the issue in this case is not warranted.

b. Review is not warranted in any event because the warrantless seizure of the Glock did not violate the Fourth Amendment irrespective of the inevitable discovery doctrine, and therefore the district court did not err in admitting the Glock into evidence. Although the district court rejected the government's argument on this point, the record indicates that the Glock was in plain view. The officers had been called to the scene to investigate a shooting

and were lawfully on the premises when Officer Rhymer observed, in plain view, a rifle resting on the closet shelf.[3] Rhymer was therefore justified in standing on a chair to examine and seize the rifle. See *Horton* v. *California*, 496 U.S. 128, 136-137 (1990); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983). Once he stood on the chair, he was also able to see something at the other end of the closet, underneath a box, that "made [him] lift th[e] box" (11/5/93 Tr. 72); he observed that "someone had lifted the box and put [the Glock] under the box" (*id.* at 70). Thus, although the Glock was underneath a box, Officer Rhymer was able to see it from his position in the closet, and he properly seized the Glock under the "plain view" exception to the warrant requirement. *Arizona* v. *Hicks*, 480 U.S. 321, 326-329 (1987).

Moreover, even accepting the district court's holding that the Glock was not in plain view, the Fourth Amendment was not violated because the police were justified in conducting a limited search of the bedroom for a loaded firearm that could have presented a serious danger to their safety. Cf. *Maryland* v. *Buie*, 494 U.S. 325, 327 (1990); *United States* v. *Lopez*, 989 F.2d 24, 27 (1st Cir.), cert. denied, 114 S. Ct. 201 (1993). After Investigator Hitesman examined the spent shell casing and concluded that it could not have come from the Smith & Wesson

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[3] The district court's ruling that the rifle was not in plain view because it had to be pulled further out from the shelf to be photographed is plainly erroneous. Officer Rhymer's testimony established that he saw the butt of a rifle from his position below the shelf of the open closet in petitioner's bedroom. 11/5/93 Tr. 69, 70. The rifle was therefore in plain view, and Officer Rhymer was entitled to stand on a chair to seize it and examine it further.

pistol identified by petitioner as the homicide weapon, the officers became aware of the high probability that another weapon was in the apartment. In addition, because the officers found only one shell casing, it was likely that the missing weapon was still loaded, which turned out to be the case. See pp. 3-4, *supra*. The presence of the loaded weapon presented a serious danger to the police, and that danger was exacerbated by the fact that petitioner's mother still had access to the apartment and was freely moving back and forth between her house and the apartment. Under those circumstances, the police were not required to obtain a warrant before they looked for a loaded weapon in the room in which the killing had taken place. Cf. *Buie*, 494 U.S. at 334; *Lopez*, 989 F.2d at 27 (upholding warrantless search for weapon when "the intrusion, although not minimal, was limited"; "[t]here was no new entry into a private residence" because the police were "lawfully" there; and the object of the search was "a dangerous weapon in a building where others might gain access to it"). But cf. *United States* v. *Ford*, No. 94-3057 (D.C. Cir. June 9, 1995), slip op. 13 (holding *Buie* inapplicable to search for weapons under mattress and behind window shade).[4]

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[4] Even if the admission of the Glock was error, that error was clearly harmless on the murder count and the obstruction of justice count. On the murder charge, the evidence of Hendricks's seated position, the fact that she was shot from a distance of two feet, and the soot marks on her hands indicating that she was grabbing or hitting the barrel of the gun demonstrated beyond a reasonable doubt that she was not killed accidentally. The specific weapon used in the killing was not crucial to the murder case, and the evidence was sufficiently compelling that the jury would have found petitioner

2. Petitioner also argues (Pet. 13-14) that his conviction must be reversed because the prosecutor, on cross-examination, improperly questioned him about the rifle and shotgun suppressed by the district court. That factbound contention is without merit.

Absent an exception, the exclusionary rule prohibits the introduction into evidence of items seized during an unlawful search and of "testimony concerning knowledge acquired during an unlawful search." *Murray* v. *United States*, 487 U.S. 533, 536 (1988). In this case, the government introduced neither the suppressed weapons themselves nor testimony concerning their existence or presence at the murder scene. Rather, the prosecutor cross-examined petitioner about his post-arrest statement to the police, in which he asserted that he had shot Hendricks with a Smith & Wesson and denied owning any other weapons. Based on that incident, petitioner was charged with obstructing justice by falsely

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guilty beyond a reasonable doubt even if the police had never recovered the murder weapon. The admission of the Glock was harmless on the obstruction of justice count because, even before the police recovered the Glock, they concluded that the bullet used in the murder and found underneath the bed could not have come from the Smith & Wesson tendered by petitioner as the homicide weapon. Petitioner's statements to the police, both at the house and at the police station, that he used the Smith & Wesson in the killing, obstructed the investigation without regard to the fact that the police eventually recovered the Glock. In addition, although the government's expert witness at trial was able to state with certainty that the expended shell came from a Glock, he could not state conclusively that it came from the Glock found in petitioner's closet. See 2 Tr. 122-123. Petitioner's conviction on obstruction of justice therefore did not rest on the fact that the police recovered the Glock used in the murder.

stating to the police that he shot Hendricks with a Smith & Wesson. See C.A. App. 5.

The prosecutor properly asked petitioner what he had told the police following his arrest, and whether he had told the truth. Petitioner acknowledged that he told the police that he owned no weapons other than the Smith & Wesson, and that his statement to that effect was false. The prosecutor, in turn, asked whether the statement was false because he owned weapons other than the Glock, without referring specifically to any other weapons. Petitioner's counsel did not object to that question, and petitioner admitted that he did own other weapons. The prosecutor followed up by asking what other weapons petitioner owned, and petitioner testified in response that he owned a rifle and shotgun. See 3B Tr. 130.

The questioning of petitioner was permissible. The exclusionary rule did not preclude the prosecutor from asking petitioner whether his post-arrest statements to the police were false, or from inquiring why they were false. The prosecutor carefully avoided mentioning any specific weapons other than the Glock or directly confronting petitioner with evidence that he owned the suppressed weapons.

At the point at which the prosecutor asked petitioner whether his statement was false because he owned weapons other than the Glock, defense counsel raised no objection. Even assuming there was any impropriety in that question, it did not amount to plain error. The shotgun and rifle were not central to any of the counts on which petitioner was found guilty. Neither was used in the killing of Hendricks, and petitioner's conviction on obstruction of justice rested on his false statements that he used the Smith

& Wesson in that shooting, not his possession of the shotgun or the rifle. Petitioner's admission that he also owned a shotgun and a rifle therefore had no appreciable impact on the jury's verdict.

3. Relying on *Government of the Virgin Islands* v. *Smith*, 949 F.2d 677 (3d Cir. 1991), petitioner argues (Pet. 14-16) that the district court committed plain error in failing to instruct the jury that the prosecution has the burden of proof on the "affirmative defense" of excusable homicide. That contention is incorrect.

In *Smith*, the Third Circuit held that, in a murder prosecution under Virgin Islands law, once the defendant has placed the affirmative defense of self-defense in issue, the government is required to disprove self-defense beyond a reasonable doubt, and the trial court must so instruct the jury. 949 F.2d at 680-681. Petitioner's defense in this case was based on his assertion that his killing of Hendricks was accidental. It is not clear, however, that, under Virgin Islands law, petitioner's defense based on accident would be considered a separate affirmative defense, rather than a contention that he lacked the necessary *mens rea* to commit the crime charged. The court of appeals did not address that issue, and we are not aware of any case law directly addressing the point under Virgin Islands law. While we do not dispute that the government ultimately had the burden of proving beyond a reasonable doubt that the shooting was not accidental, the failure to give a separate instruction on that point was not plain error, since the district court instructed the jury that the prosecution had the burden of proof on every element of the offense. See 6 Tr. 74, 76-77.

The trial court further instructed the jury that, to convict petitioner of second degree murder under Virgin Islands law, the government was required to prove beyond a reasonable doubt that petitioner acted willfully and with malice aforethought. The court explained to the jury that "malice aforethought" required an intent to take the life of a human being or to act in callous and wanton disregard of the consequences to human life. 6 Tr. 96. The district court thus adequately instructed the jury that petitioner could be convicted of murder only if the prosecution proved beyond a reasonable doubt that he acted with unlawful intent. Since it was clear that a finding of malice aforethought would have been incompatible with petitioner's claim of accident, the court's instructions effectively conveyed to the jury that the prosecution was required to prove that the shooting of Hendricks was not accidental.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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